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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
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Fees for Ancillary or Supplementary Use of Digital Television Spectrum Pursuant to Section 336(e)(1) of the Telecommunications Act of 1996	)	MM Docket No. 97-247

COMMENTS OF THE INFORMATION TECHNOLOGY INDUSTRY COUNCIL

The Information Technology Industry Council ("ITI") submits these Comments in response to the Notice of Proposed Rule Making[1] in the above captioned docket.

ITI is the leading trade association of manufacturers and vendors of computers, consumer electronics, computing, and information products and services. ITI represents a variety of information technology companies, including manufacturers, integrators and service providers. For more than two decades, ITI (formerly known as the Computer and Business Equipment Manufacturers Association) has played a leading role in the development of rules governing the design, development, and marketing of computing and other information technology devices and services.

[1] *Fees for Ancillary or Supplementary Use of Digital Television Spectrum Pursuant to Section 336(e)(1) of the Telecommunications Act of 1996,* MM Docket No. 97-247, FCC 97-414 (released December 19, 1997) ("NPRM").

INTRODUCTION

Section 336(e)(1) of the Communications Act of 1934, as amended (the "Act"),[2] requires the Commission to assess and collect fees for digital television ("DTV") licensees' use of DTV spectrum to provide ancillary or supplementary services for which the licensees either (1) charge subscription fees to recipients of the services, or (2) receive other compensation (directly or indirectly) from third parties for the transmission of material such third parties furnish[3] (collectively, "feeable services"[4]). The purpose of this proceeding is to establish the fee program Section 336(e)(1) requires.

The Commission should consider three fundamental principles in developing the fee program, in addition to the requirements (discussed below) that Section 336(e)(2) of the Act prescribes for the program. First, the fees should not be set at levels that could discourage innovation and investment in the development and deployment of new DTV-related services and products. Second, the fee structure should be simple and predictable. Third, the Commission should recognize that the value of the DTV spectrum is speculative at best and that use of that spectrum will entail enormous, but still unquantifiable, costs; therefore, fees should not be based on an estimated value

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[2] 47 U.S.C. § 336(e)(1).

[3] Such material excludes commercial advertising that supports broadcasts for which no subscription fees are charged. *Id.* at § 336(e)(1)(B). The Commission has interpreted this provision as exempting from the fee requirement only those broadcasts that are supported *entirely* by commercial advertisements. NPRM at ¶ 8.

[4] As used herein, the term "feeable services" is intended to have the same meaning as the term "feeable ancillary or supplementary services," which the Commission uses in the NPRM. *See* NPRM at ¶¶ 5, 8.

of the spectrum, or, if they are, should be based on very conservative estimates of the spectrum's value.

The Commission has the statutory authority – and arguably the duty -- to consider these principles in designing and implementing the fee program. Section 336(b)(5) of the Act requires the Commission to "prescribe such other regulations [governing DTV licensees' eligibility and provision of ancillary or supplementary services] as may be necessary for the protection of the public interest, convenience, and necessity."[5] As explained below, adoption of the principles and fee structure ITI advocates herein will enhance DTV's potential and create tangible benefits for consumers, thereby furthering the Commission's obligations under Section 336(b)(5) to serve the public interest.

DISCUSSION

I. DTV FEES SHOULD BE SET AT LEVELS THAT ENCOURAGE INNOVATION AND INVESTMENT IN NEW SERVICES AND PRODUCTS.

The Commission has recognized that "the DTV licensees' ability to provide ancillary or supplementary services will 'allow the broadcasters flexibility to respond to the demands of their audience' for such services."[6] The ability of licensees to satisfy consumers' demand for new services should not be stifled by the imposition of an overly burdensome fee structure. Instead, the Commission should establish fees that encourage investment and risk-taking in the

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[5] 47 U.S.C. § 336(b)(5).

[6] NPRM at ¶ 4 (quoting *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service,* MM Dkt. No. 87-268, Fifth Report and Order, 12 FCC Rcd 12806 (1997) at ¶ 29).

development and deployment of innovative DTV-related services and products.

The convergence of the consumer electronics, computing, and telephony markets -- each of which is represented to some degree by ITI's membership -- is increasingly producing new voice, data, image, and video services which are transported over a variety of media, soon to include DTV. Consumers access these services with an astonishing array of new products sold at affordable prices driven down by vigorous competition. With the advent of DTV, this trend could be expected to accelerate rapidly unless regulation of the new medium, particularly the fee program, interferes with the development of DTV and the products and services it will spawn.

The deployment of DTV is somewhat analogous to the growth of the Internet. In each case, the potential of the new medium was at first difficult to predict, but was widely believed to be significant as long as the medium remained unencumbered by oppressive government-mandated costs or other regulation.

In *MTS and WATS Market Structure,*[7] the Commission declined to impose interstate access charges on enhanced service providers ("ESPs") because of the risk those charges could pose to ESPs' viability. The Commission stated that "[o]ne of [its] paramount concerns . . . is the customer impact or market displacement" that the imposition of access charges on ESPs might cause.[8]

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[7] CC Docket No. 78-72, Phase I Memorandum Opinion and Order, 97 F.C.C. 2d 682, 715 (1983) (subsequent history omitted).

[8] *Id.*

Five years later, the Commission again refused to impose access charges on ESPs, reasoning that the enhanced services industry was in transition.[9] And last year, the Commission once again declined to apply the existing access charge regime to ESPs because the industry was still evolving.[10] The Commission concluded that forbearance from the imposition of existing access charges would foster the development of the Internet and other information services and thus promote certain objectives of the Telecommunications Act of 1996.[11]

The Commission's policy has paid handsome royalties. The Internet is a vibrant, thriving, and constantly growing medium that has produced innumerable benefits for all segments of our society. As the Commission has recognized, the overwhelming success of the Internet is due in large measure to the agency's regulatory forbearance from imposing fees on the medium.[12]

The same policy judgments that have fostered the growth of the Internet should similarly compel the Commission to use extreme caution in designing a

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9 *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers,* CC Dkt. No. 87-215, 3 FCC Rcd 2631, 2632-33 (1988).

10 *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, and End User Common Line Charges,* CC Dkts. Nos. 96-262, 94-1, 91-213, 95-72, First Report and Order, FCC 97-158 (released May 17, 1997) at ¶ 344 (subsequent history omitted).

11 *Id.*

12 In the Notice of Inquiry in *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, and Usage of the Public Switched Network by Information Service and Internet Access Providers,* CC Dkts. Nos. 96-262, 94-1, 91-213, 96-263, 11 FCC Rcd 21354 (released December 24, 1996) at ¶ 285, the Commission wrote, "It is extremely unlikely that, had per-minute interstate access rates applied to ESPs over the past 13 years, the Internet and other information services would not have

fee structure for DTV – the next medium to have seemingly limitless potential for consumers. Onerous fees would diminish and perhaps even eliminate incentives to invest in the development and deployment of innovative DTV-related products and services, thereby depriving the public of useful and as yet unforeseeable advanced technologies.

The Commission has acknowledged that "[a] fee set too high would serve as a disincentive for broadcasters to provide [feeable services and] could reduce the benefits that consumers receive from services provided on the DTV capacity."[13] ITI concurs with this observation and accordingly urges the Commission to establish low fees that would be universally affordable.

II. THE FEE PROGRAM SHOULD BE SIMPLE AND PREDICTABLE AND BASED ON A PERCENTAGE OF GROSS REVENUES FROM FEEABLE SERVICES.

ITI strongly endorses the Commission's statement in the NPRM that "the fee should be simple to understand and be calculable with readily available information."[14] As the Commission has correctly observed, a complex fee program could make fee calculation and enforcement difficult, create uncertainty that might impair DTV licensees' business planning, and complicate the Commission's administration of the fee program.[15]

To address these concerns, ITI advocates adoption of a fee based simply

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developed to the extent they have today – and indeed might not have developed commercially at all."

13 NPRM at ¶ 11.

14 NPRM at ¶ 9.

15 *Id.*

on a percentage of the gross revenues each licensee derives from the provision of feeable services. The percentage should be fixed across-the-board, regardless of a licensee's size. Such an approach would be simple, equitable, predictable, and consistent with one of the methodologies the Commission has identified in the NPRM.[16]

III. IF THE COMMISSION BASES THE FEE ON THE VALUE OF DTV SPECTRUM, IT SHOULD BE CONSERVATIVE IN ESTIMATING THAT VALUE.

Section 336(e)(2) of the Act requires the DTV fee program to be designed to (1) recover for the public a portion of the value of the DTV spectrum; (2) avoid unjust enrichment; and (3) recover for the public, *to the extent feasible,* an amount equal to, but not more than, the amount that would have been recovered if DTV licenses had been awarded through competitive bidding.[17]

Although the Commission is obligated to implement these requirements, such implementation will be extremely difficult to achieve with any precision. The Commission itself has acknowledged this difficulty with respect to any fee program based on estimated amounts that competitive bidding would have generated.[18] As the Commission noted, it would be "difficult if not impossible to assess" the amount DTV spectrum auctions would have raised, given the "innumerable unknown variables" involved, and therefore, such an approach is

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16 NPRM at ¶ 24. As the Commission has noted, the use of gross revenues eliminates many of the infirmities inherent in a net revenues formula. *Id.*

17 47 U.S.C. § 336(e)(2)(A), (B).

18 NPRM at ¶¶ 15-16.

not "technically feasible" within the scope of Section 336(e)(2)(B).[19] Because it is not technically feasible, the Commission is not obligated to employ an auction-based methodology.

Similar problems would render a spectrum-value approach equally unreliable. Estimating the economic value of the DTV spectrum would be extremely difficult. It would require consideration not only of economic benefits to licensees, but also of licensees' costs of using the spectrum – costs which will likely vary widely among individual licensees. In addition, any such valuation would have to account for the numerous (and still evolving) legal and practical restrictions on each licensee's use of its DTV spectrum.

The Commission apparently believes that a methodology based on revenues received from feeable services would satisfy the statutory directive of a value-based methodology.[20] In a very imprecise way, this may be true. But given the overwhelming number and uncertainty of variables that must be considered in calculating a license's "value," any approach that attempts to estimate such value should be undertaken with extreme caution and should err on the side of a low value, at least until demonstrable, reliable information exists to warrant adjusting the estimates.

CONCLUSION

In view of the foregoing, ITI urges the Commission to adopt ITI's proposed methodology. That methodology, based on a percentage of gross revenues

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19 *Id.* at ¶ 15.

20 *Id.* at ¶ 17.

from feeable services, would (under the Commission's reasoning) at least superficially satisfy the statutory requirement of value-based fees, and would be simple, predictable, and equitable. If the Commission adopts this proposal and sets a percentage that is low enough to be widely affordable, the fee program should not overly burden innovation and investment in DTV-related products and services. If, however, actual experience with such a program proves otherwise, the Commission should exercise its authority under Section 336(e)(2)(C) of the Act[21] to adjust the methodology.

Respectfully submitted,

INFORMATION TECHNOLOGY INDUSTRY COUNCIL

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278.01/DigitalTV/COM DTV Fee NPRM

[21] 47 U.S.C. § 336(e)(2)(C).

Certificate of Service

I, Molly McEwan, hereby certify a true and correct copy of the preceding Comments of the Information Technology Industry Council in MM Docket No. 97-247 were served this 1st day of May, 1998 via hand delivery upon the following party:

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May 01, 1998